No. 9204

In the United States Circuit Court of Appeals for the Ninth Circuit

COUNTY OF FRESNO AND G. P. CUMMINGS, ASSESSOR OF THE COUNTY OF FRESNO, STATE OF CALIFORNIA, APPELLANTS

v.

COMMODITY CREDIT CORPORATION, APPELLEE

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

BRIEF FOR THE APPELLEE

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OPINION BELOW

The opinion of the District Court (R. 22) is a memorandum which is not reported.

JURISDICTION

The judgment of the District Court was entered March 4, 1939 (R. 23–25). Notice of appeal was filed May 5, 1939 (R. 25–26). The jurisdiction of this Court is invoked under Section 128 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936.

QUESTION PRESENTED

Whether the County of Fresno, a political subdivision of the State of California, may seize and sell for nonpayment of personal property taxes cotton pledged to the Commodity Credit Corporation, a wholly owned corporate instrumentality of the United States, unless such seizure and sale is made expressly subject to and in recognition of the prior lien interests of the Commodity Credit Corporation in the cotton.

STATUTES AND EXECUTIVE ORDERS INVOLVED

The Statutes and executive orders involved are set forth in the Appendix, *infra,* pp. 50–70.

The full text of a typical cotton producer's note and a loan agreement are printed in the appendix to the appellants' brief (pp. viii-xviii).

STATEMENT

This action was instituted in the District Court of the United States for the Southern District of California, Northern Division, by the appellee's bill of complaint (R. 4–19) for a declaratory judgment that the appellee, as an instrumentality and agency of the United States, and engaged in the governmental functions of the United States, acquired by the negotiation to it of warehouse receipts to secure the payment of advances made by the appellee to the producers of cotton, rights, liens, and interests in and to the cotton in question, including the right of possession, that are immune from taxation by the State of California and all of its political subdivisions, and that no assessment made by the appellant against the appellee's rights,

liens, and interests in and to the cotton are valid and that any seizure or sale of the cotton in the event of the nonpayment of the taxes assessed by the County of Fresno is illegal and void unless made expressly subject to the appellee's rights, liens, and interests in the cotton. The appellants moved to dismiss the appellee's bill of complaint (R. 21). The District Court denied the appellants' motion to dismiss (R. 22) and entered its judgment for the declaratory relief petitioned for in the appellee's complaint (R. 23–25).

The material facts as alleged in the bill of complaint (R. 4–19), and admitted by the motion to dismiss (R. 21), are as follows:

The Commodity Credit Corporation, organized and existing under the laws of the State of Delaware, is a corporate instrumentality of the United States whose entire capital stock is owned by the United States (R. 4–5).

In the course of the appellee's operations, and pursuant to its public purposes and governmental functions and powers, it has advanced large sums of money to the producers of cotton secured by cotton deposited in various warehouses and by warehouse receipts which have been delivered to and are held by the appellee. Under loan agreements pursuant to which the money was advanced the cotton is pledged to the appellee as security for the repayment of the advances and for all fees, costs, and expenses incident to insuring, carrying, handling, and marketing the cotton. The appellee has the possession and the right to possession of the cotton and in the event of sales of the cotton by the appellee

because of nonpayment of the advances when due or because of the happenings of other contingencies giving the appellee the right to sell the cotton, the respective borrowers who have complied with the terms of the loan agreement have no personal liability for any deficiencies resulting from sales, the liability of the respective borrowers in that event being limited to the collateral so pledged (R. 11–12).

Prior to twelve o'clock meridian, March 7, 1938, the appellee had in its possession, through the negotiation to it of warehouse receipts and on deposit in a warehouse belonging to the Valley Compress Company at Pinedale, Fresno County, California, a large quantity of cotton on which the appellee had advanced large sums of money to the producers thereof and for which the appellee held warehouse receipts. This cotton has continuously, since March 7, 1938, remained on deposit in that warehouse and the appellee has continued to and now holds warehouse receipts therefor and the rights, liens, and interests vested in it by the several warehouse receipts and loan agreements, and this cotton is now in the possession of the appellee by virtue of the warehouse receipts mentioned (R. 12–13).

Between twelve o'clock meridian, March 7, 1938, and June 21, 1938, and after June 21, 1938, the appellee received and has in its possession, through the negotiation to it of warehouse receipts and on deposit in the mentioned warehouse, a large quantity of cotton on which it had at the stated times advanced large sums of money to the producers thereof and on which it held warehouse receipts and in and to which it held the rights, liens, and interests vested in it by loan agree-

ments and warehouse receipts, a certain amount of which has continuously, since the stated dates, remained on deposit in the warehouse and in the possession of the appellee on which the appellee continued to hold and now holds warehouse receipts under which that cotton is in possession of the appellee (R. 13–14).

On March 7, 1938, G. P. Cummings, one of the appellants, was and is now the county assessor of the County of Fresno, State of California, a political subdivision of the State of California. From time to time, between March 7, 1938, and June 21, 1938, the appellant, G. P. Cummings, as the county assessor for the County of Fresno, State of California, has levied assessments upon all of the cotton deposited in the warehouse belonging to the Valley Compress Company, at Pinedale, Fresno County, California, including all of the cotton then so deposited by the appellee and covered by warehouse receipts held by the appellee. The cotton assessed was at the full assessable value and, in the case of the cotton deposited by the appellee, without any deductions or allowances whatsoever being made by reason of the appellee's rights, liens, and interests therein and without any consideration whatsoever being assigned thereto (R. 14).

On June 21, 1938, G. P. Cummings, one of the appellants, as assessor, seized and gave notice that he had on that day seized possession of 20,990 bales of cotton in the warehouse of the Valley Compress Company and that he would sell the same or as much thereof as might be necessary to satisfy the taxes levied and assessed against the 20,990 bales of cotton, together with costs of seizure and other costs, at public auction, on Wednes-

day, June 29, 1938, at 10:00 a. m., of that day at the warehouse of the Valley Compress Company, at Pinedale, Fresno County, California. The 20,990 bales of cotton which G. P. Cummings, the assessor, claims to have assessed and seized and which he so noticed for sale, includes the cotton on which the appellee has made advances to the producers thereof and for which the appellee holds warehouse receipts. In some instances these advances were made before the levy of assessment and in other instances after the levy of assessment (R. 15).

On March 7, 1938, and at all times thereafter the market value of the cotton included in the 20,990 bales and on which the appellee made advances is substantially equal to or less than the amounts advanced thereon and at all material times the interest of the appellee in and to the cotton was and now is public property of the United States so held by the appellee as an instrumentality and agency of the United States. Upon the threat of the appellant, G. P. Cummings, assessor, to offer the 20,990 bales of cotton for sale pursuant to the notice previously given by him without reservation or protection of the appellee's rights, liens, and interests therein and to take possession of the cotton so seized by him and to sell and deliver it to the purchaser, this action was instituted by the appellee (R. 15–16).

The appellants' motion to dismiss the bill of complaint having been denied the District Court, holding that the lien interests of the appellee in the cotton in question may not be burdened by taxation by the state or is political subdivisions (R. 22), decreed the relief prayed for by the appellee (R. 23–25).

A. It is settled beyond question that the functions of the United States which are carried on through corporations have, unless waived by Congress expressly or by implication, every constitutional immunity which attaches to those directly taken by the ordinary departments of the Government. So long then as the Commodity Credit Corporation functions in the exercise of powers delegated to Congress there can be no thought that its activities are proprietary or nonessential or that its corporate form is material to its status as a branch of the United States Government.

The Commodity Credit Corporation does not depend for its constitutional existence upon any unlawful delegation by Congress of legislative functions vested in it under the Constitution. Congressional ratification of the Commodity Credit Corporation's creation and congressional authorization of the continuation of its existence and functions precludes any attack on its constitutional existence on the theory that it was originally created under an unlawful delegation of power by Congress and under an Act of Congress which in itself was unconstitutional if such ratification and continued existence as will be shown was in the exercise of powers granted to the Congress under the Constitution.

The only constitutional question, therefore, in the case is whether the Commodity Credit Corporation is engaged in the exercise of a power delegated to the Congress. This question is not answered by the appellants' assertion that the Commodity Credit Corporation was created "as a means to control the field reserved to the respective states, to wit: local agricultural

production." An examination of the statute under which the Commodity Credit Corporation functions, and by which its activities are controlled, will not support that view and, on the contrary, compels the conclusion that thereunder Congress intended to and did exercise its power to regulate interstate and foreign commerce. The legislative findings by Congress in the Agricultural Adjustment Act of 1938, Section 341, with respect to cotton in the judgment of Congress require and, under the Constitution, justify the exercise of the commerce power through the regulation of cotton marketing. It is not believed that it can be said that the Act regulates the production of cotton. It authorizes the fixing of quotas for the amount to be sold and not the amount to be produced, and the purposes of the Act—stabilization of prices and marketing and commerce—are achieved by regulating the amount marketed rather than the amount grown.

Even if it be true that the fixing of marketing quotas necessarily affects production, it does not follow that it is production which is being regulated. The marketing, production, and transportation of a commodity are so interrelated that regulation of any one of these inevitably affects the other, but this collateral effect is not determinative of the constitutionality of the Act.

Even though the Act be regarded as a direct regulation of the amount of cotton produced, it would not for that reason fall without the commerce power. Congress may regulate intrastate transactions which directly affect interstate commerce even though they are incidents of production. Here the quantity of cotton produced has a direct and substantial effect both upon interstate

prices and the amounts shipped in interstate commerce. Here the objectives sought by Congress are the stabilizing of prices so as to prevent unreasonably low prices to farmers and disorderly marketing and commerce. The prevention of such evils is permissible notwithstanding the fact that "as an incident to its cure," intrastate production is affected. However, as we believe, the provisions of the Act are a valid exercise of the power of Congress to regulate interstate and foreign commerce and are not violative of the Tenth Amendment as the appellants suggest. That amendment provides only that "the powers not delegated to the United States * * * are reserved to the states." Language could not indicate more plainly that the amendment does not limit the powers which are delegated to the United States. Judicial construction accords with this view.

B. The Commodity Credit Corporation, as a corporate instrumentality and agency of the United States whose stock is wholly owned by the United States, engaged in the performance of constitutional purposes of the Federal Government, is entitled to the same immunity which attaches to those functions when directly undertaken by the ordinary departments of the Government. It, therefore, follows that the activities and property of the Commodity Credit Corporation are covered by the same immunity from state and local taxation that would preclude taxation of those activities and property if they were conducted and owned by the United States.

Apparently recognizing that property of the United States is immune from state taxation, the appellants ad-

vance the theory that this rule is limited only to property to which the United States or its instrumentalities hold a legal title, and that since the interest of the Commodity Credit Corporation in the cotton in question is that of a pledgee without legal title, the cotton should be deemed subject to state taxation. The rule of immunity which the appellants thus seek to avoid is subject to no such narrow construction. It rests upon the fundamental proposition that the National Government is supreme within the sphere of its delegated constitutional powers and that the imposition of state taxes would be in derogation of the powers of the National Government and would prevent or burden the full and legitimate exercise of those powers. The collection of the tax in the instant case, notwithstanding the appellants' contention to the contrary, will on the fact of the record directly impede and seriously burden an instrumentality of the United States, and in the absence of any congressional waiver by Congress of the immunities to which, under our system of government, that instrumentality is entitled, is barred by constitutional limitation.

Moreover, even if the immunity of the Commodity Credit Corporation, as an instrumentality of the United States, and its property is not to be implied in the silence of Congress, then the immunity from state and local taxation with which Congress, as the supreme authority, has clothed the Commodity Credit Corporation, precludes the collection of the tax in question by sale of the cotton without reference to the rights and interests of the Commodity Credit Corporation therein.

ARGUMENT

I

Appellants have no standing to challenge the constitutionality of the creation and operations of the Commodity Credit Corporation

The State of California, by legislation and administrative action, has not only recognized such federal instrumentalities as the Commodity Credit Corporation, hereinafter called the appellee, but has specifically accepted and authorized acceptance of benefits from the appellee itself. It should not now be heard to question the constitutionality of its benefactor.

The Agricultural Prorate Act of California, Deering General Laws of California, 1937, Vol. 2, Act 143a, was designed to facilitate the marketing of agricultural crops and provides for the creation of a Prorate Commission and the appointment by it of local program committees which, among other things, are authorized:

> (d) To collaborate and cooperate with agencies or organizations with similar purposes, whether of this State, other States, or of the United States, in the formulation and execution of a common marketing program; provided, that in proper cases the commission may require such collaboration and cooperation.
>
> (e) To minimize an existing surplus by cooperating with the proper agencies in the enforcement of applicable existing standardization or other laws of this State, and of the United States, enacted to protect the consuming public from fraud or deception.

Program committees created pursuant to this statute have negotiated loans from the appellee and entered into

detailed financial arrangements with it, as evidenced by an opinion of the Attorney General of California, dated August 8, 1938 (Appendix, *infra,* p. 65). That opinion considers in detail the quoted statutory provisions and authorizes a program committee to borrow funds from and pledge assets to the appellee. The grounds of unconstitutionality urged in the instant case were no less applicable at that time.

Independently of the Agricultural Prorate Act attention is invited to Section 1, Chapter 289, of the California Statutes and Amendments to the Codes (1935) (Appendix, *infra,* p. 50), which provides that every corporation organized by any agency of the United States Government, all of the capital stock of which is beneficially owned by the United States "shall be conclusively presumed to be an agency and instrumentality of the United States * * *."

It is well settled that one cannot avail himself of the benefits of a statute and later question its constitutionality. *Daniels* v. *Tearney,* 102 U. S. 415, 421; *Grand Rapids & Indiana Ry. Co.* v. *Osborn,* 193 U. S. 17, 29; *Kansas City &c. R. R. Co.* v. *Stiles,* 242 U. S. 111, 117; *Pierce Oil Corp.* v. *Phoenix Refining Co.,* 259 U. S. 125, 128–129; *St. Louis Co.* v. *Prendergast Co.,* 260 U. S. 469, 472–473; cf. *Eliason* v. *Wilborn,* 281 U. S. 457, 459–460. Even where benefits are not actually received this doctrine of estoppel applies equally to one who has taken action under a statute in quest of such benefits. *Great Falls Mfg. Co.* v. *Attorney General,* 124 U. S. 581, 598–600; *United Gas Co.* v. *Railroad Comm.,* 278 U. S. 300,

307–308. As the Supreme Court said in *Wall* v. *Parrot Silver & Copper Co.*, 244 U. S. 407, 412:

> They cannot claim the benefit of statutes and afterwards successfully assert the invalidity. There is no sanctity in such a claim of constitutional right as prevents its being waived as any other claim of right may be.

II

The Commodity Credit Corporation is a lawfully constituted instrumentality of the Federal Government engaged in the exercise of powers granted to Congress under the Constitution

The appellants for the first time challenge in this Court the constitutional existence of the Commodity Credit Corporation, hereinafter called the appellee. It is asserted (1) that the creation of the appellee by Presidential Executive Order of October 16, 1933 (Appendix, *infra,* pp. 61–64) was pursuant to an unlawfully delegated power of Congress (Br. 26–28), and (2) that the National Industrial Recovery Act, under which the alleged unlawful delegation of power was made, has been held to be unconstitutional (Br. 22–23). The appellants do not advance these contentions with great vigor and are apparently content with their mere assertion. The unconstitutionality of the appellee and its functions is not thus to be arrived at without falling into error.

The appellants' broad assertion that the National Industrial Recovery Act has been held unconstitutional in *Schechter Corp.* v. *United States,* 295 U. S. 495, is in-

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accurate because of its breadth. Section 3 of Title I of that Act, it is true, has been held unconstitutional by the Supreme Court in *Schechter Corp.* v. *United States, supra,* on the grounds (1) that the congressional delegation of power to the President to proscribe codes of fair competition found in Section 3 of the Act was an unlawful delegation of power, and (2) that the attempt through the Code of Fair Competition to fix hours and wages in intrastate commerce only remotely affecting interstate commerce was not in the exercise of a valid federal power. We are not here concerned with Section 3 of the Act and any assumption that because of the invalidity of Section 3 all other provisions of the Act are therefore invalid is erroneous. In *Alabama Power Co.* v. *Ickes,* 302 U. S. 464, the Court, while holding that the Power Company had no standing to question the validity of the loans either under the statute or under the Constitution, clearly indicated (p. 473) that the decision of the Court in the *Schechter* case with respect to Section 3 of the Act was without effect insofar as the constitutionality of other provisions of the Act were concerned. See also *Edwards* v. *United States,* 91 F. (2d) 767, 789 (C. C. A. 9th).

However, conceding *arguendo* that the Act under which Congress delegated to the President the power to create the appellee has been held unconstitutional in *Schechter Corp.* v. *United States, supra,* and *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, on the ground that it unlawfully delegated to the President of the United States powers not delegated to the Congress, and further that the Executive Order, under which the appellee was created, was in the exercise of a power unlawfully

delegated by Congress, it is by no means a necessary *sequitur* that the appellee, as of the time in question, depended for its existence on either the unconstitutional Act of Congress or any unlawful delegation of power which it may have contained. Subsequent congressional ratification of the appellee's creation and congressional continuation of the existence and the functions of the appellee remove the question of unlawful delegation of power of Congress from the case. In *Swayne & Hoyt, Ltd.,* v. *United States,* 300 U. S. 297, the Supreme Court, having previously passed the question as moot in *Ishbrandtsen-Moller Co.* v. *United States,* 300 U. S. 139, held that the transfer of the functions of the United States Shipping Board to the Secretary of Commerce by an executive order issued under an allegedly unlawful delegation of power by Congress was effective notwithstanding the fact that the transfer might have been ordered under an unlawful delegation of power by Congress. The basis for decision in *Swayne & Hoyt, Ltd.,* v. *United States, supra,* was that the ordinary principles of legislative ratification were applicable and that Congress had in that case, by subsequent enactment, effectively cured any defects in the transfer because of original unlawful delegation of power. The principle announced in *Swayne & Hoyt, Ltd.,* v. *United States,* supra, is applicable here where the Congress, subsequent to the appellee's creation, has from time to time by statute continued the existence and functions of the appellee and made appropriations for it. See Section 7 of the Act of January 31, 1935 (Appendix, *infra,* p. 51), continuing the existence of the appellee until April 1, 1937, as an agency of the United

States and authorizing the making of loans on agricultural commodities; Section 2 of the Act of January 26, 1937 (Appendix, *infra,* p. 51), continuing the functions of the appellee to the close of business on June 30, 1939; Section 302 of the Agricultural Adjustment Act of 1938 (Appendix, *infra,* pp. 53–56), authorizing the appellee to make loans upon stated conditions on certain agricultural commodities and extending the maturity date of notes evidencing loans made on cotton produced during the crop year 1937–1938; and the Act of March 8, 1938 (Appendix, *infra,* pp. 58–61), to maintain unimpaired the capital of the appellee at $100,000,000.

With then the present existence, purposes and functions of the appellee as the *criteria* by which its constitutionality is to be determined rather than its original creation, purposes, and activities, we come to the single constitutional question presented in this case other than the question of tax immunity. The appellants, doing no more than in their statement of facts (Br. 11) to point to the provision in the typical note and loan agreement (Br., App. viii–xviii) "that the producer shall not be personally liable as long as he curtails production in accordance with the plan set forth by the Secretary of Agriculture," and to subsections (c) and (f) of Section 302 of the Agricultural Adjustment Act of 1938 (Appendix, *infra,* pp. 53–55) by which, respectively, the appellee is directed to make available to cooperators loans upon cotton and to noncooperators at 60 per centum of the rate applicable to cooperators, and define a cooperator under the Act, argue that by the Agricultural Adjustment Act of 1938 Congress

"primarily was attempting to control local production of cotton."

The appellants raise no question as to the power of Congress to lend money to the producers of cotton and the provisions of the loan agreement and subsections (c) and (f) of Section 302 of the Agricultural Adjustment Act of 1938 furnish the sole basis for the appellants' argument on constitutionality.

The appellants' reliance upon subsections (c) and (f) of Section 302 of the Agricultural Adjustment Act of 1938 as a foundation upon which to predicate their argument as to the constitutionality of the appellee is not apparent. The provisions of Section 302 of the Agricultural Adjustment Act of 1938, upon which the appellants' contentions are mainly based, became effective with the approval of that Act on February 16, 1938, at which time the appellee had already made loans on the cotton here in question and had taken warehouse receipts to secure its advances. Obviously, subsections (c) and (f) cannot be taken as an attempt to regulate both the production of cotton in prior years and where loans had been previously made. In fact the very provision of the loan agreement upon which the appellants so strongly rely for their contention "that the producer shall not be personally liable as long as he curtails production in accordance with the plan set forth by the Secretary of Agriculture" is not in conformity with subsection (h) of Section 302 which provides that no producer shall be personally liable for any deficiency unless the loan was obtained through fraudulent representations by the producer. It is unnecessary, there-

fore, to consider the provisions of Section 302 except that when read in the light of the other provisions of the Agricultural Adjustment Act of 1938, there is to be found a continuation of the broad general policy of Congress with respect to agricultural commodities. The provisions of the section are not otherwise pertinent here. We shall, however, hereinafter show that if subsections (c) and (f) of Section 302 are pertinent and controlling, nevertheless any control of production thereunder is in the exercise of a power delegated to Congress under the Constitution.

A. In the exercise of the fiscal powers

Since the appellants, as we have said, raised no question as to the power of Congress to lend money to the producers of cotton, it is unnecessary to trace the causal lines which flow from the functions of the appellee and thereby to demonstrate its exercise of the fiscal powers granted in Section 8 of Article I of the Constitution.

The history of federal financial institutions and fiscal agencies is almost as long as that of the central Government itself. The mere names of these institutions summon to mind the historic periods and crises of the nation; in 1816 the Bank of the United States, in 1863 the National Banking Associations, in 1913 the Federal Reserve System, in 1916 the Federal Land Bank System, in 1917 the War Finance Corporation, in 1932 the Reconstruction Finance Corporation and the Federal Home Loan Bank System, and in 1933 the Federal Deposit Insurance Corporation. The appellee submits that designed as it is to preserve and support the credit structure of the nation, it was merely another step in

this continuing protection and support which the United States offers the credit mechanism through which all activities, whether private, state, or federal, in this day must proceed.

In *Norman* v. *Baltimore & Ohio R. Co.,* 294 U. S. 240, 303, in speaking of the federal powers to regulate currency, to borrow and to tax, the Court said:

> The broad and comprehensive national authority over the subjects of revenue, finance, and currency is derived from the aggregate of the powers granted to the Congress.

These powers, it must further be noted, are "not stereotyped as of any particular time" but furnish "a perpetual and living sanction" to Congress to consider "the changing wants and demands of society and to adopt provisions appropriate to meet every situation which it was deemed required to be provided for." *First National Bank* v. *Union Trust Co.,* 244 U. S. 416, 419.

Given the broad and flexible fiscal powers, given the importance of farm credit, and given the distressed condition of the cotton farmer along with others, we think there can be no further inquiry as to the constitutionality of the appellee. But out of an abundance of caution it would seem that Congress, having the power to establish a banking system and the equally extensive power to protect and preserve that system (*Farmers' National Bank* v. *Dearing,* 91 U. S. 29, 34), and having the authority to authorize the national banks themselves to conduct any business which is "appropriate or relevant to the banking business" (*Osborn* v. *United States Bank,* 9 Wheat. 738; *First National Bank* v.

Union Trust Co., supra, p. 420; *Smith* v. *Kansas City Title Co.,* 255 U. S. 180, 211), could function through the appellee and condition its loans. It seems beyond dispute that the maintenance or restoration of the purchasing power of cotton was "appropriate or relevant to the banking business" since Congress may validly remedy an evil which has an indisputable and calamitous impact upon the national banking system. If this be true, then the provision of the loan agreement to which the appellants point, even if the regulation of local production was intended, is nevertheless valid since it is an appropriate and relevant incident to the exercise of the fiscal power and tends to preserve the value of the security which the appellee takes for its loans and advances while minimizing the risk and loss consequent to overproduction. Federal funds, like other property of the United States, are "held in trust for the people of the whole country" (*United States* v. *Beebe,* 127 U. S. 338), and the Federal Government is clothed with the power to protect its property from harm and waste. *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288.

B. In the exercise of the commerce power

While we have previously shown that the constitutionality of the appellee is not to be determined by subsections (c) and (f) of the Agricultural Adjustment Act of 1938 (Appendix, *infra,* pp. 53–55), nevertheless since that Act may be taken as a continuation of previous congressional policy in the field of agriculture, and since the appellants rely strongly thereon, we submit that even if the two subsections are material here and

are to be taken as controlling local agricultural production, they are not unconstitutional. The appellants assign no importance to Section 2 of the Act (Appendix, *infra,* p. 52) wherein is to be found the declaration of congressional policy, nor to Section 341 [1] setting out the legislative findings of Congress with respect to American cotton. Of course these congressional declarations are not decisive, but they are matters to be considered and are not to be brushed aside on mere suggestion. *Edwards* v. *United States,* 91 F. (2d) 767, 779–780. In that case this Court upheld the validity of marketing quotas established for citrus fruits under the Agricultural Adjustment Act of 1933, c. 25, 48 Stat. 31, as amended by the Act of August 24, 1935, c. 641, 49 Stat. 750, and later reenacted as the Agricultural Mar-

[1] Agricultural Adjustment Act of 1938, c. 30, 52 Stat. 31, 55:

"PART IV—MARKETING QUOTAS—COTTON LEGISLATIVE FINDINGS

"SEC. 341. American cotton is a basic source of clothing and industrial products used by every person in the United States and by substantial numbers of people in foreign countries. American cotton is sold on a world-wide market and moves from the places of production almost entirely in interstate and foreign commerce to processing establishments located throughout the world at places outside the State where the cotton is produced.

"Fluctuations in supplies of cotton and the marketing of excessive supplies of cotton in interstate and foreign commerce disrupt the orderly marketing of cotton in such commerce with consequent injury to and destruction of such commerce. Excessive supplies of cotton directly and materially affect the volume of cotton moving in interstate and foreign commerce and cause disparity in prices of cotton and industrial products moving in interstate and foreign commerce with consequent diminution of the volume of such commerce in industrial products.

"The conditions affecting the production and marketing of cotton are such that, without Federal assistance, farmers, individ-

keting Agreement Act of 1937, c. 296, 50 Stat. 246, and held that the exercise of congressional power in the field of interstate commerce in order to obtain the price parity sought by the Act was not prevented under the Constitution from the incidental regulation of intrastate activities. The aims and purposes of Congress in the enactment of the Agricultural Adjustment Acts subsequent to the Agricultural Adjustment Act of 1933, as amended in 1935, is not an open question in this Court. *Edwards* v. *United States, supra; Wallace* v. *Hudson-Duncan & Co.,* 98 F. (2d) 985. The principles announced by this Court in those cases are applicable and decisive here. In *Mulford* v. *Smith,* 307 U. S. 38, the Supreme Court upheld the constitutionality of the provisions of the Agricultural Adjustment Act of 1938 (Appendix, *infra,* p. 52) fixing marketing quotas

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ually or in cooperation, cannot effectively prevent the recurrence of excessive supplies of cotton and fluctuations in supplies, cannot prevent indiscriminate dumping of excessive supplies on the Nation-wide and foreign markets, cannot maintain normal carry-overs of cotton, and cannot provide for the orderly marketing of cotton in interstate and foreign commerce.

"It is in the interest of the general welfare that interstate and foreign commerce in cotton be protected from the burdens caused by the marketing of excessive supplies of cotton in such commerce, that a supply of cotton be maintained which is adequate to meet domestic consumption and export requirements in years of drought, flood, and other adverse conditions as well as in years of plenty, and that the soil resources of the Nation be not wasted in the production of excessive supplies of cotton.

"The provisions of this Part affording a cooperative plan to cotton producers are necessary and appropriate to prevent the burdens on interstate and foreign commerce caused by the marketing in such commerce of excessive supplies, and to promote, foster, and maintain an orderly flow of an adequate supply of cotton in such commerce." (U. S. C. Supp. IV, Title 7, Sec. 1341.)

of tobacco and rejected the contention that the Act was a statutory plan to control agricultural production and beyond the delegated powers of Congress, saying (pp. 47, 48):

> The statute does not purport to control production. It sets no limit upon the acreage which may be planted or produced and imposes no penalty for the planting and producing of tobacco in excess of the marketing quota. It purports to be solely a regulation of interstate commerce, which it reaches and affects at the throat where tobacco enters the stream of commerce—the marketing warehouse. * * * Regulation to be effective must, and therefore may constitutionally, apply to all sales. This court has recently declared that sales of tobacco by growers through warehousemen to purchasers for removal outside the state constitute interstate commerce. Any rule, such as that embodied in the Act, which is intended to foster, protect, and conserve that commerce, or to prevent the flow of commerce from working harm to the people of the nation, is within the competence of Congress. Within these limits the exercise of the power, the grant being unlimited in its terms, may lawfully extend to the absolute prohibition of such commerce, and *a fortiori* to limitation of the amount of a given commodity which may be transported in such commerce. The motive of Congress in exerting the power is irrelevant to the validity of the legislation.

See also *Troppy* v. *LaSara Farmers Gin* Co., 28 F. Supp. 830 (S. D. Texas), holding the cotton marketing provision of the Agricultural Adjustment Act of 1938 (Appendix, *infra,* p. 52) constitutional.

Thus, irrespective of any congressional motive to control local agricultural production as attributed by the appellants, the question resolves itself into one of congressional power. Manifestly, if, as we have shown, Congress has the power to regulate the marketing of agricultural commodities in interstate commerce (*Edwards* v. *United States, supra; Wallace* v. *Hudson-Duncan & Co., supra; Mulford* v. *Smith, supra; Currin* v. *Wallace,* 306 U. S. 1), and may in the exercise of that power incidently regulate intrastate marketing (*Wallace* v. *Hudson-Duncan & Co., supra,* p. 993) or all intrastate marketing (*Mulford* v. *Smith, supra,* p. 47), Congress may regulate and condition the loans which the appellee is authorized to make to those producers of the commodity who cooperate in the purposes of the Act and to those producers who do not since such regulations and conditions bear a reasonable relationship to the main purposes of the Act and to the prevention of the evils in interstate commerce which the Act seeks to remove or minimize. *Wallace* v. *Hudson-Duncan & Co., supra.*

United States v. *Butler,* 297 U. S. 1, held that the Agricultural Adjustment Act of 1933, *supra,* providing for the payments of benefits to farmers who agreed to reduce acreage and imposing processing taxes in order to provide funds for the payment of the benefits constituted a regulation of local production rather than an exercise of the power to tax and provide for the general welfare. The provisions of that Act did not purport to regulate interstate and foreign commerce and it was not claimed that its provisions were valid

under the commerce power. The appellants construe the *Butler* case (Br. 25) as establishing that even if Congress had purported to act under the commerce power, it could not have accomplished that purpose since it would have invaded a right reserved to the several states. This wishful construction must yield to the construction placed on that case by this Court in *Edwards* v. *United States, supra,* in saying (p. 789):

> Appellant feebly contends that the decision in *United States* v. *Butler,* 297 U. S. 1, 56 S. Ct. 312, 80 L. Ed. 477, 102 A. L. R. 914, struck down not only the provisions of the Agricultural Adjustment Act there involved, but voided the entire act, and hence there was nothing to which the subsequent amendments would apply. The separability section of the statute (section 14, 7 U. S. C. A. § 614), and its provision that the unconstitutionality of one set of provisions shall not affect provisions satisfying the Constitution, refute the contention. The taxation method declared invalid is a complete plan of regulation in itself and distinct and separable from the plan of direct control of shipments. * * *

Thus, even if taken as regulating or controlling local productions of cotton, subsections (c) and (f) of Section 302 of the Agricultural Adjustment Act of 1938 (Appendix, *infra,* p. 53) are a regulation and control dictated by Congress in the exercise of a plenary power delegated to it under the Constitution or necessary and reasonable incidents to the exercise of power. *Edwards* v. *United States, supra; Mulford* v. *Smith, supra.*

C. In the exercise of the general welfare power

It is not to be denied that the agricultural and credit problems of the country have a profound effect upon the national welfare. It is true that agricultural activities within the states and the regulation thereof may be matters of local concern. *United States* v. *Butler, supra.* But in contrast appropriate agricultural credit measures of the Federal Government if national in scope and purpose provide for the general welfare since the agricultural credit structure is an inseparable part of the banking system of the nation. With the abrupt drop in farm income there was a correspondingly abrupt rise in loan delinquencies [2] which created a severe strain on the Government's agricultural credit agencies and threatened to impair the exercise of their federal functions.[3] Financial aid to enable borrowers to relieve the strain on agricultural banks exercising federal functions was a protection no less proper than that engaged in by the banks. The appellee does no more than offer a credit facility for public purposes of which prospective borrowers may voluntarily and independently avail themselves. That the terms and conditions provided in the statute and the loan agreements are incidental in purpose and proper credit precautions have been previously shown.

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[2] Local delinquencies on Federal land bank loans rose from 4.8% in 1925 to 53.2% in 1932. Crops and Mortgages, Vol. 12, No. 7, p. 270.

[3] It should be noted that the price at which the bonds of these institutions could be sold fell to a point where they could not relend at a rate high enough to meet operating expenses. The Farm Debt Problem, House Document No. 9, 73d Cong., 1st Sess., p. 32.

D. The constitutionality of the appellee's loans is not the issue in this case

The appellants' argument assumes that if because of the provisions of the loan agreement and subsections (c) and (f) of Section 302, the appellee's function in making loans on cotton is an unconstitutional function, the cotton in question may be subjected to sale for local taxes irrespective of and notwithstanding the appellee's interest therein.

The assumption is faulty in that it ignores the very material consideration that even if acquired in the exercise of an unconstitutional function, the appellee's interest in the cotton is, nevertheless, property of the United States. *Kay* v. *United States,* 303 U. S. 1, 6–7, seems to settle that constitutional or not a wholly owned corporate instrumentality of the United States is a part of the Government. However, if the cotton in question was acquired in the exercise of any power delegated to the Congress under the Constitution, then authority for its disposition is expressly granted to the Congress by Section 3 of Article IV of the Constitution. *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288.

III

The Appellee and its property are immune from State and local taxation

The appellants argue (Br. 29–44) that even if the appellee is a corporate instrumentality and agency of the United States whose stock is wholly owned by the United States and engaged in constitutional purposes of the Federal Government, (1) neither the appellee nor its property is immune from state or local taxation

by necessary implication under the Constitution, and (2), that irrespective of the principle of immunity by constitutional limitation, Congress is without power to exempt a federal instrumentality from state and local taxation.

The contention that Congress is without power to exempt a federal instrumentality from state and local taxation is wholly without merit or support in authority. In *Graves* v. *N. Y. ex rel. O'Keefe,* 306 U. S. 466, the Supreme Court said in speaking of a federal corporate instrumentality (p. 477):

> As that government derives its authority wholly from powers delegated to it by the Constitution, its every action within its constitutional power is governmental action, and since Congress is made the sole judge of what powers within the constitutional grant are to be exercised, all activities of government constitutionally authorized by Congress must stand on a parity with respect to their constitutional immunity from taxation. * * * And when the national government lawfully acts through a corporation which it owns and controls, those activities are governmental functions entitled to whatever tax immunity attaches to those functions when carried on by the government itself through its departments. * * *

Congress then has full power to exempt the appellee, its activities, its property, and the security held by it from state and local taxation (*Pittman* v. *Home Owners' Loan Corp.,* decided November 6, 1939, No. 10, October Term, 1939) and has an equal power to waive the immunity from state taxation which would otherwise

attach to federal instrumentalities and transactions. *Van Allen* v. *The Assessors,* 3 Wall. 573, 583, 585; *People* v. *Weaver,* 100 U. S. 539, 543; *Mercantile Bank* v. *New York,* 121 U. S. 138, 154; *Owensboro National Bank* v. *Owensboro,* 173 U. S. 664, 668; *Mid-Northern Oil Co.* v. *Montana,* 268 U. S. 45; *Oklahoma* v. *Barnsdall Corp.,* 296 U. S. 521, 525–526; *Baltimore National Bank* v. *State Tax Comm'n,* 297 U. S. 209; *British-American Co.* v. *Board,* 299 U. S. 159. It has, however, made no express provision as to the tax status of securities held by the appellee for the repayment of its loan. Consequently there arises the question as to the intention of Congress with respect to such security.

We shall show first that tax immunity would have been the necessary conclusion if Congress had been wholly silent as to the appellee's tax exemption, then we shall show that this normal implication is confirmed rather than contradicted by the provisions which are found in Section 5 of the Act of March 8, 1938 (Appendix, *infra,* p. 61).

A. The silence of Congress implies an immmunity from state taxation for the operations of the United States

1. *The distinction between private taxpayers and the Government.*—It is necessary at the outset to draw a sharp distinction between the tax immunity to be accorded private taxpayers who chance to deal with the Government and that inhering in the Government itself, including, of course, its instrumentalities which are a part of the Government structure (*Clallam County* v. *United States,* 263 U. S. 341). We urge that no private person should be exempt from nondiscrim-

inatory taxation merely because his transaction is with the government of a state or the nation.[4] But we think that the United States itself should not in the absence of a clear consent be forced to account to the tax collector of a state.

When this distinction is made clear, much of the differences between appellants and the Government evaporate. With much, if not most, of appellants' brief we are in complete agreement. Thus, we agree wholly that any nondiscriminatory tax should be valid; we urge only that the principle should, as are the cases on which appellants rely, be limited to taxes laid on private persons. We agree, but subject to the same limitation, that no immunity should be granted from taxes the economic burden or governmental interference of which is conjectural. We agree that the recent decisions of the Supreme Court have served to make sweeping and wise modifications in the law of intergovernmental tax immunity; we insist, however, that these decisions are confined to private taxpayers who deal with the Government.

The immunity of the Government itself from a nondiscriminatory tax is not, we think, adequately explained on the premise that "the power to tax involves the power to destroy."[5] Representative government

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[4] This generalization, as with most legal principles, is subject to qualification or exception. Taxes of a character not now known to us might present an actual interference with the operations of government; or Congress might choose to alter the normal inference to be drawn from its silence.

[5] See dissenting opinion of Justices Holmes, Brandeis, and Stone, in *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218, 223; that of

has, throughout the history of the Nation, proved an adequate guarantee against oppressive taxation. Payment of a tax, which neither in terms nor in fact marks the Government transaction as the object of the levy, will not bring the operations of the Government to a halt. For this reason the United States as *amicus curiae* urged in *James* v. *Dravo Contracting Co.*, 302 U. S. 134, that a gross-receipts tax upon the federal contractor should be sustained, even though the full amount of the tax burden would ordinarily be passed on to the Federal Government.

It is unnecessary to dwell on the anomalous philosophic nature of a tax imposed on an independent sovereign. A tax is a compulsory exaction by the sovereign from its subject.[6] Whatever the view one accepts of the nature of government, whether as the source of ultimate force or as the result of a social compact, it is plain that there is no philosophic basis for the power by unilateral action to wrest taxes from another sovereign government. It may be argued that the supremacy clause of the Federal Constitution so bulwarks the federal taxing power that it reaches to the states themselves. But this argument would defeat rather than aid any contention that the states could tax the United States.

Sutherland and Stone in *Long* v. *Rockwood*, 277 U. S. 142, 150; and the concurring opinion of Mr. Justice Frankfurter in *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466, 489–490.

[6] See *Lawrence* v. *State Tax Comm.*, 286 U. S. 276, 279; *United States* v. *LaFranca*, 282 U. S. 568, 572; *Houck* v. *Little River District*, 239 U. S. 254, 265; *Florida Central &c. R'd Co.* v. *Reynolds*, 183 U. S. 471, 475; *Illinois Central Railroad* v. *Decatur*, 147 U. S. 190, 197–198.

The principles of political science are reinforced by urgent practical considerations. If, to the manifold duties of each federal department and agency, there were added the burden of preparing numerous tax returns in each of forty-eight or more separate taxing jurisdictions, it is not difficult to see that the governmental functions would be appreciably impeded. Apart from the accounting burden, the local tax collectors might be content to accept the Government's return or they might, on the other hand, be sufficiently conscientious or antagonistic to demand the production of the Government's books. Even to permit an intelligent inspection by numerous state officials would produce a heavy and often repeated burden on the agency's staff. In the inevitable event of disputes as to the amount of liability, the Government would be faced with numerous and protracted suits. The usual delays and negotiations would be prolonged if local tax assessors abandoned any general leniency in assessment because of the vast resources of the Federal Treasury. Since its operations reach into every taxing jurisdiction in the United States, the Federal Government would be faced with a staggering obstacle to the efficient conduct of the nation's business if it were thought subject to the jurisdiction of every state and local tax collector.[7]

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[7] The only arguable exception which we know to an unbroken practice of exemption is found in the procedure followed in purchasing land in the name of the United States. Attorney General Garland, in 18 Op. A. G. 491 (1887), advised the Secretary of War to pay a recordation tax, in addition to the recordation fee, imposed by Virginia on deeds offered for record. The reasoning of the opinion, to the effect that recordation is a privilege offered by the State which the Government may accept or not as it chooses, is contradicted by the decision of the Supreme Court in

2. *The decisions of the Supreme Court.*—The rules of intergovernmental tax immunity, so far as they have been developed and applied to private persons who deal with the government, exhibit an almost bewildering diversity of decision and reasoning. A number of cases have expressly been overruled;[8] many more have been distinguished on the narrowest of grounds;[9] and in still other decisions technical rules have been devised to reach results in practical contradiction of earlier cases.[10] In short, there is no single decision exempting

Federal Land Bank v. *Crosland*, 261 U. S. 374. But, perhaps in consequence of this opinion, the practice has developed by which the United States makes payment for land purchased only after the vendor has himself placed the deed on record and satisfied all taxes. Under this practice, it will be observed, the taxpayer is not the Government but the private landowner.

[8] *Long* v. *Rockwood*, 277 U. S. 142, overruled by *Fox Film Corp.* v. *Doyal*, 286 U. S. 123; *Gillespie* v. *Oklahoma*, 257 U. S. 501, and *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, overruled by *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376; *Collector* v. *Day*, 11 Wall. 113, and *N. Y. ex rel. Rogers* v. *Graves*, 299 U. S. 401, overruled in *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466; compare *Evans* v. *Gore*, 253 U. S. 245, and *Miles* v. *Graham*, 268 U. S. 501, apparently overruled by *O'Malley* v. *Woodrough*, 307 U. S. 277.

[9] Compare, e. g.: (1) *Brush* v. *Commissioner*, 300 U. S. 352, with *Helvering* v. *Gerhardt*, 304 U. S. 405; (2) *Dobbins* v. *Commissioners of Erie County*, 16 Pet. 435, with *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466; (3) *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218; *Indian Motocycle Co.* v. *United States*, 283 U. S. 570; and *Graves* v. *Texas Co.*, 298 U. S. 393, with *Alward* v. *Johnson*, 282 U. S. 509; *Wheeler Lumber Co.* v. *United States*, 281 U. S. 572; and *James* v. *Dravo Contracting Co.*, 302 U. S. 134; (4) *Macallen Co.* v. *Massachusetts*, 279 U. S. 620, with *Pacific Co.* v. *Johnson*, 285 U. S. 480.

[10] Compare, e. g.: (1) *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 158 U. S. 601, with *Flint* v. *Stone Tracy Co.*, 220 U. S. 107 (and see Justices Brandeis, Holmes, and Stone dissenting in *National Life Ins. Co.* v. *United States*, 277 U. S. 508,

a private taxpayer from a nondiscriminatory tax which can with confidence be said to be good law today.

Measured against the fluctuating doctrines and the contrariety of results reached in the cases of taxes directed at private persons who deal with the Government, the decisions relating to a tax on the United States itself show an extraordinary uniformity. No decision of the Supreme Court has ever held, in the absence of legislative consent, that the National Government could be taxed by a state or local government. No Justice of the Supreme Court has dissented from this result in any case which we have found.[11]

Of these cases, only two, *Federal Land Bank* v. *Crosland, supra,* and *Pittman* v. *Home Owners' Loan Corp., supra,* arose under statutes which expressly declared an exemption. Each of the other cases recognized that immunity must be the result in the silence of Congress.

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527); (2) *Indian Motocycle Co.* v. *United States*, 283 U. S. 570, with *Liggett & Myers Co.* v. *United States*, 299 U. S. 383; (3) *Telegraph Co.* v. *Texas*, 105 U. S. 460, and *Williams* v. *Talladega*, 226 U. S. 404, with *James* v. *Dravo Contracting Co.*, 302 U. S. 134; (4) *Bank of Commerce* v. *New York City*, 2 Black 620, and *Home Savings Bank* v. *Des Moines*, 205 U. S. 503, with *Society for Savings* v. *Coite*, 6 Wall. 594; *Des Moines Bank* v. *Fairweather*, 263 U. S. 103; and *Schuylkill Trust Co.* v. *Pennsylvania*, 302 U. S. 506.

[11] Two cases (which are not reported) were affirmed by an equally divided Supreme Court at the December Term, 1849. Their facts are reported in *Van Brocklin* v. *State of Tennessee*, 117 U. S. 151, 175–177. One, *United States* v. *Portland*, resulted in the dismissal of a suit by the United States to recover taxes paid on a customs building; the other, *Roach* v. *Philadelphia County*, affirmed a decision that the United States was liable to local taxation on the United States Mint. These inexplicable decisions, as pointed out in the *Van Brocklin* case, have no weight as authority.

The opinions speak, generally, of a "constitutional" immunity from taxation. But in view of the undoubted power of Congress to waive the immunity of the United States or to declare an exemption which would not otherwise be granted, the immunity from state taxation seems much more properly to be viewed as an interpretation of the Act of Congress under which the transaction occurred.

Since the Second Bank of the United States had a preponderantly private stock ownership,[12] it probably would be viewed at this day as a private corporation having its own purposes as well as those of the United States (*Clallam County* v. *United States,* 263 U. S. 341), rather than the Government itself. But the Court's approach then seems to have been to view the bank as a part of the Government. In any event, the Court in *McCulloch* v. *Maryland,* 4 Wheat. 316, and *Osborn* v. *United States Bank,* 9 Wheat. 738, held the bank to be immune from discriminatory taxation upon its transactions. In *United States* v. *Railroad Co.,* 17 Wall. 322, the Court held invalid a federal tax on interest payments to the City of Baltimore.[13] *Van Brocklin* v. *State of Tennessee,* 117 U. S. 151, held land ac-

[12] The Government, under its charter, was to subscribe to only twenty percent of the stock; its subscription was in fact approximately that proportion throughout the life of the bank. Holdsworth and Dewey, *The First and Second Banks of the United States*, Sen. Doc. No. 571, 61st Cong., 2d Sess.

[13] The tax might well have been construed as laid upon the railroad, but the Court held otherwise (pp. 325–327). It is not wholly clear whether the Court construed the Act to exempt the municipal income or held it invalid as there applied; Justice Bradley concurred on the ground that the Act intended to exempt such income (p. 333). Justices Clifford and Miller dissented on

quired by the United States from a tax defaulter to be exempt from state taxation.[14] *Federal Land Bank* v. *Crosland, supra,* turned on a statutory provision for immunity, but the decision exempting mortgage recordation from state taxation has since been cited by the Supreme Court as a decision based on the Constitution in the silence of Congress.[15] In *Clallam County* v. *United States, supra,* the land and physical property of a corporation wholly owned by the Government was held exempt from local taxation, although "no specific words forbid the tax." In *New Brunswick* v. *United States,* 276 U. S. 547, the equitable interest of a wholly owned Government corporation, in land sold with the reservation of a purchase money lien, was held exempt from local taxation. While the city could tax the interest of the mortgagors, the Court held that any tax sale must be in subordination to the Government's lien.

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the ground that the city held the railroad bonds in a proprietary capacity.

[14] A number of other cases have held, under varying circumstances, that land owned by the United States is exempt from state or local taxation. E. g.: public lands prior to patent or passage of equitable title to private persons: *McGoon* v. *Scales*, 9 Wall. 23; *Railway Co.* v. *Prescott*, 16 Wall. 603; *Railway Co.* v. *McShane*, 22 Wall. 444; *Tucker* v. *Ferguson*, 22 Wall. 527, 572; *Colorado Co.* v. *Commissioners*, 95 U. S. 259; *Northern Pacific R. R. Co.* v. *Traill County*, 115 U. S. 600; *Wisconsin Railroad Co.* v. *Price County*, 133 U. S. 496, 504; *Irwin* v. *Wright*, 258 U. S. 219; *Lee* v. *Osceola Imp. Dist.*, 268 U. S. 643; *Mullen Benevolent Corp.* v. *United States*, 290 U. S. 89. Lands held in trust for Indians: *United States* v. *Rickert*, 188 U. S. 432.

[15] See *Macallen Co.* v. *Massachusetts*, 279 U. S. 620, 627; *Educational Films Corp.* v. *Ward*, 282 U. S. 379, 389; *cf. James* v. *Dravo Contracting Co.*, 302 U. S. 134, 149, 150; *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466.

In *Baltimore Nat. Bank* v. *Tax Comm'n,* 297 U. S. 209, it is true, the Reconstruction Finance Corporation was held subject to state taxation on national bank shares held by it, but this was only because Section 5219 of the Revised Statutes was construed to permit taxation of those shares by whomever held.[16]

It seems clear enough, therefore, that the Supreme Court has uniformly held the operations and the property of the Government itself to be immune from taxation, so long as there is no express waiver of that immunity by Congress. This consistency of decision, in so marked contrast to the cases dealing with private taxpayers, upon which the appellants here mainly rely, cannot be destroyed by reference either to the economic incidence of the tax burden or to the amenability of the appellee to suit.

The present case is not one in which the economic burden of the tax may be passed on by the appellee to its borrowers. It is a fact admitted by the motion to dismiss that the appellee on the cotton in question made advances substantially equal to or in excess of the market value. (R. 15.) Under subsection (h) of Section 302 of the Agricultural Adjustment Act of 1938 (Appendix, *infra,* p. 56), the appellee, in the absence of fraud, is without recourse to the borrowers and the im-

[16] Even with this inferential support for the tax liability, the Supreme Court seems to have underestimated the Congressional reluctance that the Government itself be taxed. The Act of March 20, 1936, c. 160, 49 Stat. 1185 (U. S. C. Supp. IV, Title 12, Sec. 51d), six weeks after the Court's opinion, extended the Reconstruction Finance Corporation a retroactive as well as prospective immunity from such taxation.

pact of the tax felt through a sale of the cotton without any preservation of the rights of the appellee therein would obviously be felt by the appellee originally and finally. As a consequence, the full burden of the tax would fall upon and have to be borne by the appellee alone. The appellants' assertion (Br. 29) that the tax does not unlawfully burden the appellee, ignores the practical consequences of the tax and its collection by sale under the facts of the case, and is predicated entirely on the theory that because the cotton in question is assessed to the borrowers and is within the taxing jurisdiction, neither the tax nor its collection can burden the appellee. We submit that, while to tax the cotton to those who have respectively borrowed thereon from the appellee and to subject the interests of the borrowers in the cotton to sale in collection of the tax does not burden either the appellee or the United States, nevertheless any enforced collection of the tax by sale and delivery of the cotton free of the appellee's lien is so obviously a burden and in any analysis makes the appellee the taxpayer that no further discussion is necessary.

As we have shown above, when the taxpayer is the Government itself, it is immaterial to its immunity that the cost may ultimately be paid by another. The rule was expressed by Mr. Justice Holmes, in *Johnson* v. *Maryland,* 254 U. S. 51, 55–56, that there is an "entire absence of power on the part of the States to touch," by taxation, "the instrumentalities of the United States." Since that case involved the attempt to require a license of a mail-truck driver, the somewhat elusive term "instrumentalities" must be read to refer to the operations

of the Government. So understood, the rule is not a relic of an older jurisprudence but a principle which is still unimpaired, either in its vitality or in its authority.

Similarly, it is a matter of no consequence that, even in the silence of Congress, the corporate organization of the appellee might have led to an inference that it was intended to be amenable to suit, if at least it had been sired by another corporation itself liable to suit. *Keifer & Keifer* v. *R. F. C.,* 306 U. S. 381. For the "immunity of corporate government agencies from suit * * * is less readily implied than immunity from taxation." *Federal Land Bank* v. *Priddy,* 295 U. S. 229, 235.

3. *The waiver of immunity must be clear.*—The tax immunity of the property and the operations of the Government itself is, then, a rule which is reinforced by strong practical reasons and sanctioned by an unbroken line of decisions of the Supreme Court. It is a rule of statutory, rather than of constitutional construction, but its consistency gives to the silence of Congress an eloquence and a force which will not often be found in rules based on legislative silence. Compare Bikle, *The Silence of Congress,* 41 Harv. Law Rev. 200; Powell, *The Still Small Voice of the Commerce Clause,* 3 Selected Essays on Constitutional Law 931.

One would expect, then, that the normal tax immunity which attaches to the property and operations of the United States would not be lost except by a waiver which was both express and unequivocal. Such is the rule. "The waiver must be clear, and every well-grounded doubt upon the subject should be resolved in favor of the exemption." *Austin* v. *The Aldermen,*

7 Wall. 694, 699. See *Farmers Bank* v. *Minnesota,* 232 U. S. 516, 528.

In *Graves* v. *N. Y. ex rel. O'Keefe, supra,* pp. 479–480, the Court found the silence of Congress no bar to the taxation of salaries paid government officers and employees, because "the Congressional intention is not to be gathered from the statute by implication" and because the doctrine of the silence of Congress has little application "to the tax immunity of governmental instrumentalities." Cf. *Helvering* v. *Gerhardt,* 304 U. S. 405, 412. This ruling, urged by the Government as *amicus curiae,* was made with respect to an immunity claimed by a private person. As we have shown above the immunity of the Government itself stands upon quite a different footing. Here there is a settled and wholly consistent line of decisions, reflecting the most urgent practical considerations, which demonstrate the normal expectation that the United States will not be required itself to pay taxes to the state governments. The Supreme Court truly said (p. 480), of the private taxpayer who claimed immunity from a nondiscriminatory tax, that since "there is no ground for implying a constitutional immunity, there is equally a want of any ground for assuming any purpose on the part of Congress to create an immunity." Here there is every ground for implying a "constitutional" immunity of the appellee itself, and added strength is lent to the common-sense supposition that the silence of Congress would be intended to continue rather than to destroy the rule which always theretofore had been supposed to apply in the absence of an express waiver of immunity.

B. We have shown that Congress had full power to exempt the appellee, its functions, and its property from state and local taxation

We have shown that if Congress had remained wholly silent, there would have been an immunity from state taxation. The only remaining question is whether Congress has made any provision that may be construed as a consent to the imposition.

By Section 5 of the Act of March 8, 1938 (Appendix, *infra,* p. 61), Congress has provided:

> SEC. 5. Bonds, notes, debentures, and other similar obligations issued by the Commodity Credit Corporation under the provisions of this Act shall be deemed and held to be instrumentalities of the Government of the United States, and as such they and the income derived therefrom shall be exempt from Federal, State, municipal, and local taxation (except surtaxes, estate, inheritance, and gift taxes). The Commodity Credit Corporation, including its franchise, its capital, reserves, and surplus, and its income shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority; except that any real property of the Commodity Credit Corporation shall be subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed.

This provision not only fails as a waiver of immunity, but affirmatively exempts the appellee from the tax in question.

The statute offers a generalized tax exemption of "the Commodity Credit Corporation." This broad exemp-

tion is quite evidently intended to exempt the appellee from all taxes which would be collected from it as a taxpayer. The enumeration of its franchise, its capital, etc., is not a provision for specific exemptions, leaving other assets or transactions taxable, but is merely offered as illustrative of what is *included* in the exemption of "the Commodity Credit Corporation."

Any thought that the enumeration marks the limit of the exemption is dispelled by the specific exception of real property. Unless tax exemption for real property were thought included in the exemption of "the Commodity Credit Corporation," there could have been no occasion for its exception. Since property other than real estate is equally included in the exemption of "the Commodity Credit Corporation," a specific exception would be equally necessary for its taxation. Thus, when Congress intended that the tangible personal property of the production credit organizations and the banks for cooperatives should be subject to taxation, the exception of real estate in a similar exemption section was expanded to include tangible personal property. (Section 63, Farm Credit Act of 1933, c. 98, 48 Stat. 257; U. S. C., Title 12, Sec. 1138c.)

The statute subjects the appellee to only one form of taxation, a nondiscriminatory tax on real property. The exception was plainly designed simply to prevent the withdrawal from the normal *ad valorem* tax rolls of real estate by the appellee.

The appellants' contention that because Section 5 did not expressly grant an immunity from taxation to the pledgee's interests acquired by the appellee to the cotton in question herein, assumes the necessity that

Congress expressly provided immunity and that in the absence of an express immunity, no immunity will be implied as we have shown. We think, however, immunity from taxation will be implied and taxation by state and local authorities in the case of the Federal Government or any of its instrumentalities is permissible only when Congress has expressly consented thereto.

IV

This case is controlled by *New Brunswick* v. *United States*

The court below, in denying the appellants' motion to dismiss on the authority of *New Brunswick* v. *United States,* 276 U. S. 547, was clearly right. In that case the United States Housing Corporation, a corporation organized under the laws of the State of New York, under an Act of Congress of May 16, 1918, c. 54, 40 Stat. 550, to provide housing facilities for workers engaged in ship construction and other industries manufacturing war materials and supplies in connection with those purposes, acquired land in New Brunswick, subdivided it into lots, and erected workmen's houses thereon. After the war these houses were sold by the Housing Corporation to the workers under contracts on the monthly installment plan of payment with the provision that when ten percent of the purchase price had been paid the corporation would issue warranty deeds to the purchasers and take mortgages for the balance due. After ten percent of the purchase price had been paid, but before actual delivery of the deeds, the City of New Brunswick assessed certain taxes against the properties which were not paid and the taxing officials threatened to sell the properties at a tax sale. Suit

was brought by the corporation in which the United States was joined as a plaintiff to have the assessments cancelled and the threatened tax sales enjoined. The court accepted the city's contention that the purchasers were in equity the real owners of the property in question and that for the purpose of the case legal title to the property was in the purchasers but went further to point out that (p. 555):

> As between the Corporation and the City, the taxability of the lots is to be determined as if both the deeds and the mortgages had been executed; that is, as if the Corporation, while conveying the legal title to the purchasers, had retained a mortgage lien to secure the balance of the purchase price.

And concluded that notwithstanding the fact that legal title to the property in question stood or might be deemed to have vested in the private individuals, it was not subject to tax sales by the city taxing officials so long as the federal agency or instrumentality had a lien on the property to secure the payment of money due to it unless all rights, liens, and interests in the property retained and held by the instrumentality as security for its advances were expressly excluded from such sales and that the sales be made by express terms subject to such prior rights, liens, and interests, saying (pp. 555–556):

> Under the provisions of the New Jersey law the taxes assessed to the purchasers, as equitable owners, rest upon the entire lots, including not only the interests of the purchasers as equitable owners, but the interest of the Corporation re-

tained and held as security for the payment of the unpaid purchase moneys; no distinction being made under that law between the interest of the owners and that of mortgagees or lienors. We see no reason, however, if the New Jersey law permits, why the City may not assess taxes against the purchasers upon the entire value of the lots and enforce collection thereof by sale of their interests in the property. With that the Corporation and the United States have no concern. *But it is plain, under the doctrine of the Clallam case, that the City is without authority to enforce the collection of the taxes thus assessed against the purchasers by a sale of the interest in the lots which was retained and held by the Corporation as security for the payment of the unpaid purchase money,* whether as an incident to the retention of the legal title or as a reserved lien or as a contract right to mortgages. That interest, being held by the Corporation for the benefit of the United States, is paramount to the taxing power of the State and cannot be subjected by the City to sale for taxes.

We conclude that, although the City should not be enjoined from collecting the taxes assessed to the purchasers by sales of their interests in the lots, as equitable owners, it should be enjoined from selling the lots for the collection of such taxes unless all rights, liens and interests in the lots, retained and held by the Corporation as security for the unpaid purchase moneys, are expressly excluded from such sales, and they are made, by express terms, subject to all such prior rights, liens and interests. * * * [Italics supplied.]

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In the present case the threatened sale is one in no way reserving or protecting the rights of the appellants and necessity for the application of the rule announced in the *Brunswick* case is more acute since we are concerned here with personal property while that case dealt with real property. Real property cannot be removed from its situs. Sale of the personal property here involved would result in turning it over to irresponsible persons who may be expected to dispose of and deliver it to others. The cotton would be removed and probably could not be located. The bales would be broken and identification of the property made impossible. Protection of appellee's rights would be impossible.

New Brunswick v. *United States, supra,* not only completely refutes the appellants' contention based on legal title and the appellee's pledgee interests in the cotton, but is helpful in respect to the consideration of other factors entering in this case and which have been considered above. Significantly, the Act authorizing the creation of the Housing Corporation, Act of May 16, 1918, c. 74, 40 Stat. 550, as amended by Act of June 4, 1918, c. 92, 40 Stat. 594, provided no express immunity for the Housing Corporation and the decision of the Court in that case upheld the immunity on the theory of both supremacy and implication. Failure of the appellants to discuss or even mention *New Brunswick* v. *United States, supra,* notwithstanding the fact that the decision below went on the authority of that case, leads us to the belief that that case is so precisely in point and so definitely controlling here that no distinction of that case can be, and hence is not, made by the appellants on brief.

In *Thompson* v. *Kentucky,* 209 U. S. 340, the Court preserved the lien of the Federal Government as we contend in upholding the power of the state to tax warehouse spirits after payment of the taxes due the United States Government which were secured by a lien. While there was no conflict of jurisdiction in the case the Court said (p. 348):

> There is no conflict between the state and Federal purpose. *There is no question of the supremacy of the latter and its complete fulfillment.* "The State does not propose," the Court of Appeals said, "to collect the taxes so long as the spirits are in the custody or under the lien of the Federal Government." There is actual accommodation, therefore, of the power of the State to the rights of the Federal Government, and a harmonious exercise of the respective sovereignties of each, preserving to each necessary power. This is what *Carstairs* v. *Cochran* decides. See also *Baltimore Shipbuilding & Dry Dock Co.* v. *Baltimore,* 195 U. S. 375. [Italics supplied.]

V

Other points

Out of an abundance of caution the appellee at the risk of unnecessarily burdening the Court invites the Court's attention to a consideration that should not pass the Court's attention:

Section 3716 of the Political Code of California (1937) provides in part as follows:

> * * * Every tax has the effect of a judgment against the person, and every lien created by this

> title has the force and effect of an execution duly levied against all property of the delinquent; the judgment is not satisfied nor the lien removed until the taxes are paid or the property sold for the payment thereof; provided, that the lien of every tax whether now existing or hereafter attaching shall cease to exist for all purposes after thirty years from the time said tax became a lien; * * *

Section 25 of Warehouse Receipts Act (General Laws of California (1937), Vol. Two, Act 9059) provides as follows:

> *Surrender of receipt prerequisite to attachment.*—If goods are delivered to a warehouseman by the owner or by a person whose act in conveying the title to them to a purchaser in good faith for value would bind the owner, and a negotiable receipt is issued for them, they cannot thereafter, while in the possession of the warehouseman, be attached by garnishment or otherwise, or be levied upon under an execution, unless the receipt be first surrendered to the warehouseman, or its negotiation enjoined. The warehouseman shall in no case be compelled to deliver up the actual possession of the goods until the receipt is surrendered to him or impounded by the court.

Commodity Credit Corporation holds warehouse receipts covering all cotton deposited in the warehouses on which it has made advances. These receipts never have been surrendered to the warehouseman, and their execution never has been enjoined. Under the circumstances, the cotton cannot be "levied upon under an execution." Yet the effect of the action of appellants is to levy an execution on such cotton. This is pro-

hibited by the express prohibition in the Warehouse Receipts Act above quoted.

CONCLUSION

We have shown that the appellee is a duly constituted corporate agency and instrumentality of the United States engaged in the exercise of a constitutional power of Congress; that if Congress were silent, tax immunity of the appellee, its property, operations, and interests would be the rule; that Congress has not consented to state and local taxation of the appellee, its property, operations, and interests; and that if the appellee is engaged in the performance of functions within the powers of Congress, the threatened sale of the cotton in which it is interested is under the circumstances of this case prohibited by the decision of the Supreme Court in *New Brunswick* v. *United States, supra.* The decision of the court below should be affirmed.

Respectfully submitted.

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DECEMBER 1939.

APPENDIX

California Statutes and Amendments to the Codes (1935), c. 289:

* * * * *

SECTION 1. Every corporation organized under the laws of this State or of any other State of the United States or of the District of Columbia, or under an act of the Congress of the United States, by any Agency of the United States government, all of the capital stock of which is beneficially owned by the United States or by an agency or instrumentality of the United States, or by any corporation the whole of the capital stock of which is owned by the United States or by an agency or instrumentality of the United States, shall be conclusively presumed to be an agency and instrumentality of the United States and shall be entitled to all privileges and immunities to which the holder or holders of all of its stock are entitled as agencies of the United States government.

SEC. 2. This act is hereby declared to be an urgency measure necessary for the immediate preservation of the public peace, health, and safety, within the meaning of section 1 of Article IV of the Constitution, and it shall therefore go into immediate effect. The facts constituting the necessity are as follows:

Due to the widespread depression many citizens of this State find themselves in distressed circumstances and in need of immediate relief which can be obtained only from corporations, which, although not incorporated by act of Congress, are wholly owned by agencies or instrumentalities of the United States including corporations wholly owned by the United States.

Said corporations may not undertake the work of furnishing such relief unless their status as agents and instrumentalities of the United States is unequivocally recognized by this State.

Act of January 31, 1935, c. 2, 49 Stat. 1:

AN ACT To extend the functions of the Reconstruction Finance Corporation for two years, and for other purposes.

* * * * *

SEC. 7. Notwithstanding any other provision of law, Commodity Credit Corporation, a corporation organized under the laws of the State of Delaware as an agency of the United States pursuant to the Executive order of the President of October 16, 1933, shall continue, until April 1, 1937, or such earlier date as may be fixed by the President by Executive order, to be an agency of the United States. During the continuance of such agency, the Secretary of Agriculture and the Governor of the Farm Credit Administration are authorized and directed to continue, for the use and benefit of the United States, the present investment in the capital stock of Commodity Credit Corporation, and the corporation is hereby authorized to use all its assets, including capital and net earnings therefrom, and all moneys which have been or may hereafter be allocated to or borrowed by it, in the exercise of its functions as such agency, including the making of loans on agricultural commodities.

* * * * *

Act of January 26, 1937, c. 6, 50 Stat. 5:

AN ACT To continue the functions of the Reconstruction Finance Corporation, and for other purposes.

* * * * *

SEC. 2. (a) Section 7 of the Act approved January 31, 1935 (Public, Numbered 1, Seventy-fourth Congress), is hereby amended by striking

from the first sentence thereof "April 1, 1937" and inserting in lieu thereof "the close of business on June 30, 1939"; section 1 of the Act approved March 31, 1936 (Public, Numbered 484, Seventy-fourth Congress), is hereby amended by striking from the first sentence thereof "February 1, 1937" and inserting in lieu thereof "the close of business on June 30, 1939"; section 9 of the Act approved January 31, 1935 (Public, Numbered 1, Seventy-fourth Congress), is hereby amended by striking from the first sentence thereof "June 16, 1937" and inserting in lieu thereof "the close of business on June 30, 1939".

* * * * *

Agricultural Adjustment Act of 1938, c. 30, 52 Stat. 31:

AN ACT To provide for the conservation of national soil resources and to provide an adequate and balanced flow of agricultural commodities in interstate and foreign commerce, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Agricultural Adjustment Act of 1938."

DECLARATION OF POLICY

SEC. 2. It is hereby declared to be the policy of Congress to continue the Soil Conservation and Domestic Allotment Act, as amended, for the purpose of conserving national resources, preventing the wasteful use of soil fertility, and of preserving, maintaining, and rebuilding the farm and ranch land resources in the national public interest; to accomplish these purposes through the encouragement of soil-building and soil-conserving crops and practices; to assist in the marketing of agricultural commodities for domestic consumption and for export; and to regulate interstate and foreign commerce in cotton, wheat, corn, tobacco, and rice to the extent necessary to provide an orderly, adequate, and

balanced flow of such commodities in interstate and foreign commerce through storage of reserve supplies, loans, marketing quotas, assisting farmers to obtain, insofar as practicable, parity prices for such commodities and parity of income, and assisting consumers to obtain an adequate and steady supply of such commodities at fair prices.

* * * * *

LOANS ON AGRICULTURAL COMMODITIES

SEC. 302. (a) The Commodity Credit Corporation is authorized, upon recommendation of the Secretary and with the approval of the President, to make available loans on agricultural commodities (including dairy products). Except as otherwise provided in this section, the amount, terms, and conditions of such loans shall be fixed by the Secretary, subject to the approval of the Corporation and the President.

(b) The Corporation is directed to make available to cooperators loans upon wheat during any marketing year beginning in a calendar year in which the farm price of wheat on June 15 is below 52 per centum of the parity price on such date, or the July crop estimate for wheat is in excess of a normal year's domestic consumption and exports, at rates not less than 52 per centum and not more than 75 per centum of the parity price of wheat at the beginning of the marketing year. In case marketing quotas for wheat are in effect in any marketing year, the Corporation is directed to make available, during such marketing year, to noncooperators, loans upon wheat at 60 per centum of the rate applicable to cooperators. A loan on wheat to a noncooperator shall be made only on so much of his wheat as would be subject to penalty if marketed.

(c) The Corporation is directed to make available to cooperators loans upon cotton during any marketing year beginning in a calendar year in which the average price on August 1 of seven-

eighths Middling spot cotton on the ten markets designated by the Secretary is below 52 per centum of the parity price of cotton on such date, or the August crop estimate for cotton is in excess of a normal year's domestic consumption and exports, at rates not less than 52 per centum and not more than 75 per centum of the parity price of cotton as of the beginning of the marketing year. In case marketing quotas for cotton are in effect in any marketing year, the Corporation is directed to make available, during such marketing year, to noncooperators, loans upon cotton at 60 per centum of the rate applicable to cooperators. A loan on cotton to a noncooperator shall be made only on so much of his cotton as would be subject to penalty if marketed.

(d) The Corporation is directed to make available loans upon corn during any marketing year beginning in the calendar year in which the November crop estimate for corn is in excess of a normal year's domestic consumption and exports, or in any marketing year when on November 15 the farm price of corn is below 75 per centum of the parity price, at the following rates:

75 per centum of such parity price if such estimate does not exceed a normal year's consumption and exports and the farm price of corn is below 75 per centum of the parity price on November 15;

70 per centum of such parity price if such estimate exceeds a normal year's domestic consumption and exports by not more than 10 per centum;

65 per centum of such parity price if such estimate exceeds a normal year's domestic consumption and exports by more than 10 per centum and not more than 15 per centum;

60 per centum of such parity price if such estimate exceeds a normal year's domestic consumption and exports by more than 15

per centum and not more than 20 per centum;

55 per centum of such parity price if such estimate exceeds a normal year's domestic consumption and exports by more than 20 per centum and not more than 25 per centum;

52 per centum of such parity price if such estimate exceeds a normal year's domestic consumption and exports by more than 25 per centum.

Loans shall be made to cooperators in the commercial corn-producing area at the applicable rate of the above schedule. Loans shall be made to noncooperators within such commercial corn-producing area but only during a marketing year in which farm-marketing quotas are in effect and only on corn stored under seal pursuant to section 324, and the rate of such loans shall be 60 per centum of the applicable rate under the above schedule. Loans shall be made to cooperators outside such commercial corn-producing area, and the rate of such loans shall be 75 per centum of the applicable rate under the above schedule.

(e) The rates of loans under subsections (b), (c), and (d) on wheat, cotton, and corn not of standard grade, type, staple, or quality shall be increased or decreased in relation to the rates above provided by such amounts as the Secretary prescribes as properly reflecting differences from standard in grade, type, staple, and quality.

(f) For the purposes of subsections (b), (c), and (d), a cooperator shall be a producer on whose farm the acreage planted to the commodity for the crop with respect to which the loan is made does not exceed the farm acreage allotment for the commodity under this title, or, in the case of loans upon corn to a producer outside the commercial corn-producing area, a producer on whose farm the acreage planted to soil-depleting crops does not exceed the farm acreage al-

lotment for soil-depleting crops for the year in which the loan is made under the Soil Conservation and Domestic Allotment Act, as amended. For the purposes of this subsection a producer shall not be deemed to have exceeded his farm-acreage allotment unless such producer knowingly exceeded his farm-acreage allotment.

(g) Notwithstanding any other provision of this section, if the farmers producing cotton, wheat, corn, or rice indicate by vote in a referendum carried out pursuant to the provisions of this title that marketing quotas with respect to such commodity are opposed by more than one-third of the farmers voting in such referendum, no loan shall be made pursuant to this section with respect to the commodity during the period from the date on which the results of the referendum are proclaimed by the Secretary until the beginning of the second succeeding marketing year for such commodity. This subsection shall not limit the availability or renewal of any loan previously made.

(h) No producer shall be personally liable for any deficiency arising from the sale of the collateral securing any loan under this section unless such loan was obtained through fraudulent representations by the producer.

* * * * *

(U. S. C. Supp. IV, Title 7, Sec. 1302.)

* * * * *

SUBTITLE D—MISCELLANEOUS PROVISIONS AND APPROPRIATIONS

PART I—MISCELLANEOUS

COTTON PRICE ADJUSTMENT PAYMENTS

* * * * *

SEC. 381. (b) Any producer for whom a loan has been made or arranged for by the Commodity Credit Corporation on cotton of his 1937 crop

and who has complied with all the provisions of the loan agreement except section 8 thereof, may, at any time before July 1, 1938, transfer his right, title, and interest in and to such cotton to the Corporation; and the Corporation is authorized and directed to accept such right, title, and interest in and to such cotton and to assume all obligations of the producer with respect to the loan on such cotton, including accrued interest and accrued carrying charges to the date of such transfer. The Corporation shall notify the Secretary of Agriculture of each such transfer, and upon receipt of such notice, the Secretary shall as soon as compliance is shown, or a national marketing quota for cotton is put into effect, forthwith pay to such producer a sum equal to 2 cents per pound of such cotton, and the amount so paid shall be deducted from any price adjustment payment to which such producer is entitled.

(c) The Commodity Credit Corporation is authorized on behalf of the United States to sell any cotton of the 1937 crop so acquired by it, but no such cotton or any other cotton held on behalf of the United States shall be sold unless the proceeds of such sale are at least sufficient to reimburse the United States for all amounts (including any price-adjustment payment) paid out by any of its agencies with respect to the cotton so sold. After July 31, 1939, the Commodity Credit Corporation shall not sell more than three hundred thousand bales of cotton in any calendar month, or more than one million five hundred thousand bales in any calendar year. The proceeds derived from the sale of any such cotton shall be used for the purpose of discharging the obligations assumed by the Commodity Credit Corporation with respect to such cotton, and any amounts not expended for such purpose shall be covered into the Treasury as miscellaneous receipts (U. S. C. Supp IV, Title 7, Sec. 138).

EXTENSION OF 1937 COTTON LOAN

SEC. 382. The Commodity Credit Corporation is hereby authorized and directed to provide for the extension, from July 31, 1938, to July 31, 1939, of the maturity date of all notes evidencing a loan made or arranged for by the Corporation on cotton produced during the crop year 1937–1938. This section shall not be construed to prevent the sale of any such cotton on request of the person liable on the note (U. S. C. Supp. IV, Title 7, Sec. 1382).

* * * * *

Act approved, February 16, 1938.

Act of March 8, 1938, c. 44, 52 Stat. 107:

AN ACT To maintain unimpaired the capital of the Commodity Credit Corporation at $100,000,000, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That as of the 31st of March in each year and as soon as possible thereafter, beginning with March 31, 1938, an appraisal of all the assets and liabilities of the Commodity Credit Corporation for the purpose of determining the net worth of the Commodity Credit Corporation shall be made by the Secretary of the Treasury. The value of assets shall, insofar as possible, be determined on the basis of market prices at the time of appraisal and a report of any such appraisal shall be submitted to the President as soon as possible after it has been made. In the event that any such appraisal shall establish that the net worth of the Commodity Credit Corporation is less than $100,000,000, the Secretary of the Treasury, on behalf of the United States, shall restore the amount of such capital impairment by a contribution to the Commodity Credit Corporation in the amount of such impairment. To enable the Secretary of the Treasury to make such payment to the Com-

modity Credit Corporation, there is hereby authorized to be appropriated annually, commencing with the fiscal year 1938, out of any money in the Treasury not otherwise appropriated, an amount equal to any capital impairment found to exist by virtue of any appraisal as provided herein.

SEC. 2. In the event that any appraisal pursuant to section 1 of this Act shall establish that the net worth of the Commodity Credit Corporation is in excess of $100,000,000, such excess shall, as soon as practicable after such appraisal, be deposited in the Treasury by the Commodity Credit Corporation and shall be credited to miscellaneous receipts. The Secretary of the Treasury is directed, as soon as practicable, to use any amounts so deposited to retire an equivalent amount of the public debt, which amount shall be in addition to any other amount required to be used for such purpose.

SEC. 3. The Secretary of Agriculture, the Governor of the Farm Credit Administration, and the Reconstruction Finance Corporation are hereby authorized and directed to transfer to the United States all right, title, and interest in and to the capital stock of the Commodity Credit Corporation which each of them now holds. All rights of the United States arising out of the ownership of such capital stock shall be exercised by the President, or by such officer, officers, agency, or agencies as he shall designate, and in such manner as he shall prescribe.

SEC. 4. With the approval of the Secretary of the Treasury, the Commodity Credit Corporation is authorized to issue and have outstanding at any one time, bonds, notes, debentures, and other similar obligations in an aggregate amount not exceeding $500,000,000. Such obligations shall be in such forms and denominations, shall have such maturities, shall bear such rates of interest, shall be subject to such terms and conditions, and shall be issued in such manner and

sold at such prices as may be prescribed by the Commodity Credit Corporation, with the approval of the Secretary of the Treasury. Such obligations shall be fully and unconditionally guaranteed both as to interest and principal by the United States, and such guaranty shall be expressed on the face thereof, and such obligations shall be lawful investments and may be accepted as security for all fiduciary, trust, and public funds the investment or deposit of which shall be under the authority or control of the United States or any officer or officers thereof. In the event that the Commodity Credit Corporation shall be unable to pay upon demand, when due, the principal of, or interest on, such obligations, the Secretary of the Treasury shall pay to the holder the amount thereof which is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, and thereupon to the extent of the amount so paid the Secretary of the Treasury shall succeed to all the rights of the holders of such obligations. The Secretary of the Treasury, in his discretion, is authorized to purchase any obligations of the Commodity Credit Corporation issued hereunder, and for such purpose the Secretary of the Treasury is authorized to use as a public-debt transaction the proceeds from the sale of any securities hereafter issued under the Second Liberty Bond Act, as amended, and the purposes for which securities may be issued under such Act, as amended, are extended to include any purchases of the Commodity Credit Corporation's obligations hereunder. The Secretary of the Treasury may at any time sell any of the obligation of the Commodity Credit Corporation acquired by him under this section. All redemptions, purchases, and sales by the Secretary of the Treasury of the obligations of the Commodity Credit Corporation shall be treated as public-debt transactions of the United States.

No such obligations shall be issued in excess of the assets of the Commodity Credit Corporation, including the assets to be obtained from the proceeds of such obligations, but a failure to comply with this provision shall not invalidate the obligations or the guaranty of the same. The Commodity Credit Corporation shall have power to purchase such obligations in the open market at any time and at any price.

SEC. 5. Bonds, notes, debentures, and other similar obligations issued by the Commodity Credit Corporation under the provisions of this Act shall be deemed and held to be instrumentalities of the Government of the United States, and as such they and the income derived therefrom shall be exempt from Federal, State, municipal, and local taxation (except surtaxes, estate, inheritance, and gift taxes). The Commodity Credit Corporation, including its franchise, its capital, reserves, and surplus, and its income shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority; except that any real property of the Commodity Credit Corporation shall be subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed.

Executive Order of October 16, 1933:

EXECUTIVE ORDER

AUTHORIZING THE FORMATION OF A CORPORATION TO BE KNOWN AS THE COMMODITY CREDIT CORPORATION

WHEREAS, the Congress of the United States has declared that an acute emergency exists by reason of widespread distress and unemployment, disorganization of industry, and the im-

pairment of the agricultural assets supporting the national credit structure, all of which affects the national public interest and welfare, and

WHEREAS, in order to meet the said emergency and to provide the relief necessary to protect the general welfare of the people, the Congress of the United States has enacted the following acts:

1. The Agricultural Adjustment Act, approved May 12, 1933.
2. The National Industrial Recovery Act, approved June 16, 1933.
3. The Federal Emergency Relief Act of 1933, approved May 12, 1933.
4. Reconstruction Finance Corporation Act, approved January 22, 1932.
5. The Federal Farm Loan Act, approved July 17, 1916.
6. The Farm Credit Act of 1933, approved June 16, 1933.
7. The Emergency Relief and Construction Act of 1932, approved July 21, 1932.

AND WHEREAS, in order, effectively and efficiently, to carry out the provisions of said acts it is expedient and necessary that a corporation be organized with such powers and functions as may be necessary to accomplish the purposes of said acts.

NOW, THEREFORE, under and by virtue of the authority vested in me by the National Industrial Recovery Act of June 16, 1933, it is hereby ordered that an agency, to wit, a corporation, under the laws of Delaware, be created, said corporation to be named the Commodity Credit Corporation.

The governing body of said corporation shall consist of a board of directors composed of eight members, and the following persons, who have been invited and have given their consent to serve, shall be elected by the incorporators as such directors:

Henry A. Wallace, Secretary of Agriculture.

George N. Peek, Administrator, Agricultural Adjustment Administration.

Oscar Johnston, Director of Finance, Agricultural Adjustment Administration.

Henry Morgenthau, Jr., Governor, Farm Credit Administration.

Herman Oliphant, General Counsel, Farm Credit Administration.

Lynn P. Talley, Assistant to the Directors of the Reconstruction Finance Corporation.

E. B. Schwulst, Special Assistant to the Directors of the Reconstruction Finance Corporation.

Stanley Reed, General Counsel of the Directors of the Reconstruction Finance Corporation.

The office and principal place of business of said corporation outside the State of Delaware shall be in the city of Washington, and branch offices may be established in such places within the United States as the said board of directors shall select and determine by and with the consent of the Secretary of Agriculture and the Governor of the Farm Credit Administration.

The capital stock of such corporation shall consist of 30,000 shares of the par value of $100 each.

The Secretary of Agriculture and the Governor of the Farm Credit Administration are hereby authorized and directed to cause said corporation to be formed, with such articles or certificate of incorporation, and bylaws, which they shall deem requisite and necessary to define the methods by which said corporation shall conduct its business.

The Secretary of Agriculture and the Governor of the Farm Credit Administration are authorized and directed to subscribe for all of said capital stock for the use and benefit of the United States. There is hereby set aside for the purpose of subscribing to the capital stock in said corporation the sum of $3,000,000 out of the appropriation of $100,000,000 authorized by section

220 of the National Industrial Recovery Act and made by the Fourth Deficiency Act, fiscal year 1933, approved June 16, 1933 (Public, No. 77, 73d Congress).

It is hereby further ordered that any outstanding stock standing in the name of the United States shall be voted by the Secretary of Agriculture and the Governor of the Farm Credit Administration jointly, or by such person or persons as the said Secretary of Agriculture and the Governor of the Farm Credit Administration shall appoint as their joint agent or agents for that purpose. The board of directors (other than the initial board of directors elected by the incorporators) shall be elected, and any vacancies thereon shall be filled by the Secretary of Agriculture and the Governor of the Farm Credit Administration jointly, subject to the approval of the President of the United States.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE,
October 16, 1933.

[No. 6340]

Executive Order of March 22, 1938 (Federal Register 1938, Vol. 3, p. 632):

PRESIDENT OF THE UNITED STATES.

EXECUTIVE ORDER

DESIGNATING THE SECRETARY OF THE TREASURY AS THE OFFICIAL TO RECEIVE CERTAIN CAPITAL STOCK FROM THE RECONSTRUCTION FINANCE CORPORATION, THE SECRETARY OF AGRICULTURE, AND THE GOVERNOR OF THE FARM CREDIT ADMINISTRATION

By virtue of and pursuant to the authority vested in me by the act of February 24, 1938, Public, No. 432, 75th Congress, and the act of March 8, 1938, Public, No. 442, 75th Congress, I hereby designate the Secretary of the Treasury

on behalf of the United States to receive from the Reconstruction Finance Corporation all of such capital stock as the Reconstruction Finance Corporation may hold pursuant to any provision of law referred to in subsection (b) of Section 1 of the said act of February 24, 1938, and to receive from the Secretary of Agriculture and the Governor of the Farm Credit Administration such stock of the Commodity Credit Corporation as they now hold.

The Secretary of the Treasury is hereby authorized and directed to exercise on behalf of the United States any and all rights accruing to the holder of such stock.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE,
March 22, 1938.

[No. 7848]

STATE OF CALIFORNIA

LEGAL DEPARTMENT

SAN FRANCISCO,
August 8, 1938.

Hon. EDSON ABEL,
Secretary, Agricultural Prorate Commission,
State Office Building, Sacramento, California.

DEAR SIR: I have before me your letter of August 5, 1938, which reads in part as follows:

> Raisin Proration Zone No. 1 was created by this Commission on August 4, 1937, under the provisions of the statute commonly known as the Agricultural Prorate Act, copy of which in its present form, is enclosed herewith.
>
> As is evidenced by the language of the statute, its entire purpose is to improve marketing conditions for agricultural producers. In pursuance

of this purpose, the program committee of Raisin Proration Zone No. 1 contemplates that the tremendous grape crop of this year will necessitate a surplus pool of raisins to insure some stability in the raisin market.

As an additional stability factor of primary importance in maintaining prices to producers at reasonably satisfactory levels, the program committee of Raisin Proration Zone No. 1 has negotiated a financing arrangement with the Commodity Credit Corporation, an agency of the Agricultural Adjustment Administration, Washington, D. C., under which loans of an agreed amount per ton will be available to raisin producers making application therefor on their 1938 tonnage by local lending agencies which will take as collateral the so-called free tonnage (tonnage not required to be pooled) of the borrowing producer, and as additional security will have the guarantee of Commodity Credit Corporation against loss. This arrangement will put a floor under the market for the protection and benefit of raisin producers.

As security to Commodity Credit Corporation in addition to that obtained from the physical collateral pledged to the local lending agencies by individual borrowers, Commodity Credit Corporation demands that any raisin tonnage placed in the 1938 surplus pool through the operations of the proration program also be pledged to Commodity Credit Corporation.

As an additional incident to the loan program outlined above, Commodity Credit Corporation has agreed to loan to Raisin Proration Zone No. 1, or its agent, up to $4.00 per ton on all pooled raisins to cover storage, insurance, handling, and other costs involved in the pooling operation. These charges are, of course, necessary in the handling of the pool and in the ordinary course probably would be derived from fees collected from raisin producers. However, this is an undesirable feature involving an additional burden

upon producers at a time when they are least able to bear it. Hence, the loan arrangement has been made with Commodity Credit Corporation. In making the loan, the latter demands that the pool tonnage be pledged to repay this loan.

Section 19.1 of the Agricultural Prorate Act does not expressly authorize the program committee to do what is demanded by Commodity Credit Corporation in either instance.

To avoid these objections, it has been proposed that the Zone transfer the pool tonnage to the Raisin Proration Association, a nonprofit corporation, with the members of the program committee of the zone as directors, for the purpose of handling and disposition in accordance with the provisions of the Agricultural Prorate Act.

After this transfer, the pool tonnage would be pledged to secure the payment of its carrying charges and to secure the repayment of loans made to individuals are guaranteed by Commodity Credit Corporation.

Commodity Credit Corporation requires a statement from this Commission and from your office to the effect that the Agricultural Prorate Act contains no provisions making the proposed pledge of the pool tonnage for the specified purposes illegal.

You call attention to the fact that loans to individuals are made for the purpose of injecting stability into the raisin market for all producers. One of the reasons for the demand of the Commodity Credit Corporation is to discourage the trafficking in producers' equities in the surplus pool, which practice has had a very demoralizing effect upon market stability.

You further call attention to the fact that Commodity Credit Corporation is a federal agency with purposes identical with those of Raisin Proration Zone No. 1, and that the transactions contemplated are involved in a joint operation of the two agencies for identically

the same purpose, namely, the maintenance of stability in the raisin market for the benefit of producers.

The purposes and objects of the Prorate Act are fully discussed in the case of *Agricultural Prorate Commission* v. *Superior Court,* 5 Cal. (2d) 550, wherein the Supreme Court of this state upheld the constitutionality of the act as originally enacted, and we deem it unnecessary to dwell thereon in this communication.

While, as you point out, the act does not expressly authorize the program committee to pledge the pool tonnage as collateral for loans that might be made for the benefit of producers in carrying out the purposes of the statute, we are of the opinion that such authority must necessarily be implied from the powers given to the committee.

Section 19.1 of the act sets forth the express powers given to the committee. It is there provided that:

> The program committee, for the purpose of minimizing the effect of existing surpluses upon market conditions, shall be empowered in any or all of the following particulars:
>
> (a) To establish and maintain surplus pools which shall be authorized to receive from each producer from time to time his surplus of the prorated commodity and market the same by grades for the account of the producer when it can be advantageously disposed of either in its original or some converted state; provided however, such surplus shall not be marketed in any form which would directly compete with that part of the crop which is regularly certificated; and provided further, that any part of any such surplus may be turned over by a program committee to charitable organizations, self-help cooperatives, and similar agencies under proper safeguards, to prevent any part of the commodity so disposed of from directly competing with the part of the crop marketed through the usual channels of trade. * * *

(b) To create, establish or otherwise obtain and operate facilities for the grading, packing, servicing, processing, preparing for market and disposal of such surplus in such manner as to maintain stability in the markets and to sell such surplus and/or any of its derived products.

* * * * *

(d) To collaborate and cooperate with agencies or organizations with similar purposes, whether of this State, other States or of the United States, in the formulation and execution of a common marketing program; provided, that in proper cases the commission may require such collaboration and cooperation.

* * * * *

(i) To make contracts and agreements in the name of the zone in the furtherance of any of the powers mentioned in this section. * * *

From the provisions of Subdivision (a) above quoted it will be seen that the committee may dispose of any surplus to charitable organizations, presumably by giving it away if it so desires, provided that it is done under such safeguards as will prevent any part of the commodity so disposed of from directly competing with that part of the crop marketed through the usual channels of trade.

If the committee has the power to dispose of such surplus by outright gift, we see no reason why the committee may not pledge the same as collateral for a loan which will aid in carrying out the purposes of the statute.

Under Subdivision (d) the committee is empowered to collaborate and cooperate with agencies of the United States in the formulation and execution of a common marketing program and, under Subdivision (i), is empowered to make agreements in the name of the zone in furtherance of any of the powers mentioned in said Section 19.1 of the act.

These powers, in our opinion, are sufficiently broad to authorize the borrowing of money in furtherance of the objects of the statute. Indeed, we understand that the statute has in the past been interpreted by your Commission as authorizing the making of loans and that loans have been made by such Committee. Such contemporaneous construction is entitled to great weight. *Riley* v. *Forbes,* 193 Cal. 740 at 745.

Since the committee has the power to borrow money, it necessarily follows that it has power to pledge the surplus pool as collateral for any funds that might be borrowed. And since under the provisions of the act the committee has the power to make a gift of such surplus, under certain restrictions, it may make a transfer of such surplus to the Raisin Proration Association in the manner proposed, provided, of course, that proper safeguards are set up to prevent any part of the commodity so disposed of from competing with the crop marketed through the usual channels of trade.

Amendments to the present marketing program authorizing the proposed loan program should perhaps be approved by your Commission.

Very truly yours,

U. S. WEBB,
Attorney General.
By W. R. AUGUSTINE,
Deputy Attorney General.

WRA: H
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U. S. GOVERNMENT PRINTING OFFICE: 1939